

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant injured his left knee on October 25, 2013, when his foot slipped on the edge of a step, he lost his balance and hit his left knee on a truss he was carrying. At the time, respondent, a temporary staffing service, had assigned claimant to work at Perfection Structural Components. Claimant testified he reported the injury to respondent and Perfection. He was sent by respondent to Angela Moore, D.O., at New Medical Health Care for treatment. Dr. Moore saw claimant the same day as the accident, and assigned claimant restrictions of no lifting, kneeling and crawling, and wearing a brace/wrap. The doctor also ordered an MRI of claimant's injured left knee. The doctor's October 25, 2013, notes indicate an addendum on October 28, 2013, that claimant returned for crutches to help with ambulation.

Claimant testified he took Dr. Moore's restrictions to respondent on Monday, October 28, 2013, and told respondent, based upon the restrictions assigned by Dr. Moore, he probably would not be able to return to Perfection. Freda, who worked in respondent's office, told claimant he could possibly work in the office doing paperwork in the truss yard with Jose, the head foreman/claimant's supervisor at Perfection. Claimant testified that about the time he was speaking to Freda, Steve, respondent's owner, looked at the restrictions. Claimant informed Steve of not being able to stand on his leg or do any lifting and asked Steve what to do. Steve told claimant to go home until claimant heard from Dr. Moore concerning the MRI results.

Stacey Reedy, respondent's human resources manager, indicated New Medical faxed claimant's restrictions to respondent on the day of the accident. Ms. Reedy testified that on October 28, she personally offered claimant a light duty position at Perfection, but claimant declined the position. Ms. Reedy avowed Steve never participated in the conversation.

On November 1, 2013, Dr. Moore saw claimant again. The left knee MRI revealed a medial meniscal tear and some bone edema. The doctor assigned claimant restrictions of using crutches for ambulation and wearing a brace/wrap, as well as no crawling, kneeling, squatting and lifting. Dr. Moore then referred claimant to see an orthopedic specialist, Dr. Kenneth Jansson. Claimant testified he took the restrictions from Dr. Moore to his attorney and respondent.

On November 5, 2013, claimant's attorney sent a letter to respondent indicating claimant was available for work "within the physical restrictions imposed by his workers

compensation doctor.”¹ On November 13, 2013, Viola Maxwell of Berkley Assigned Risk Services sent a fax to claimant’s attorney indicating claimant was offered a temporary position working in the office doing paperwork, but declined the position.

PRINCIPLES OF LAW AND ANALYSIS

The Board’s review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only those issues listed in K.S.A. 2012 Supp. 44-534a(a)(2). Those issues are: (1) did the employee suffer an accident, repetitive trauma or resulting injury, (2) did the injury arise out of and in the course of the employee’s employment, (3) was timely notice given, or (4) do certain defenses apply. The term “certain defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.² The Board can also review preliminary decisions when a party alleges the ALJ exceeded his or her jurisdiction.³

The issue of whether a worker is entitled to temporary total disability benefits is not generally considered jurisdictional. That issue is fully within the authority granted to ALJs.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁴

K.S.A. 2012 Supp. 44-510c(b)(2)(B) provides:

Where the employee remains employed with the employer against whom benefits are sought, an employee shall be entitled to temporary total disability benefits if the authorized treating physician imposed temporary restrictions as a result of the work injury which the employer cannot accommodate. A refusal by the employee of accommodated work within the temporary restrictions imposed by the authorized treating physician shall result in a rebuttable presumption that the employee is ineligible to receive temporary total disability benefits.

Because the review requested by respondent does not raise an issue of compensability enumerated in K.S.A. 2012 Supp. 44-534a(a)(2) and there has been no showing the ALJ exceeded his authority, the application for Board review must be dismissed for lack of jurisdiction.

¹ P.H. Trans., Cl. Ex. 2.

² *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

³ K.S.A. 2012 Supp. 44-551(i)(2)(A).

⁴ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

WHEREFORE, the undersigned Board Member finds that respondent's request for Board review of the December 13, 2013, preliminary hearing Order entered by ALJ Klein is hereby dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this ____ day of February, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge

⁵ K.S.A. 2012 Supp. 44-534a.

⁶ K.S.A. 2012 Supp. 44-555c(k).